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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 238.

Affd

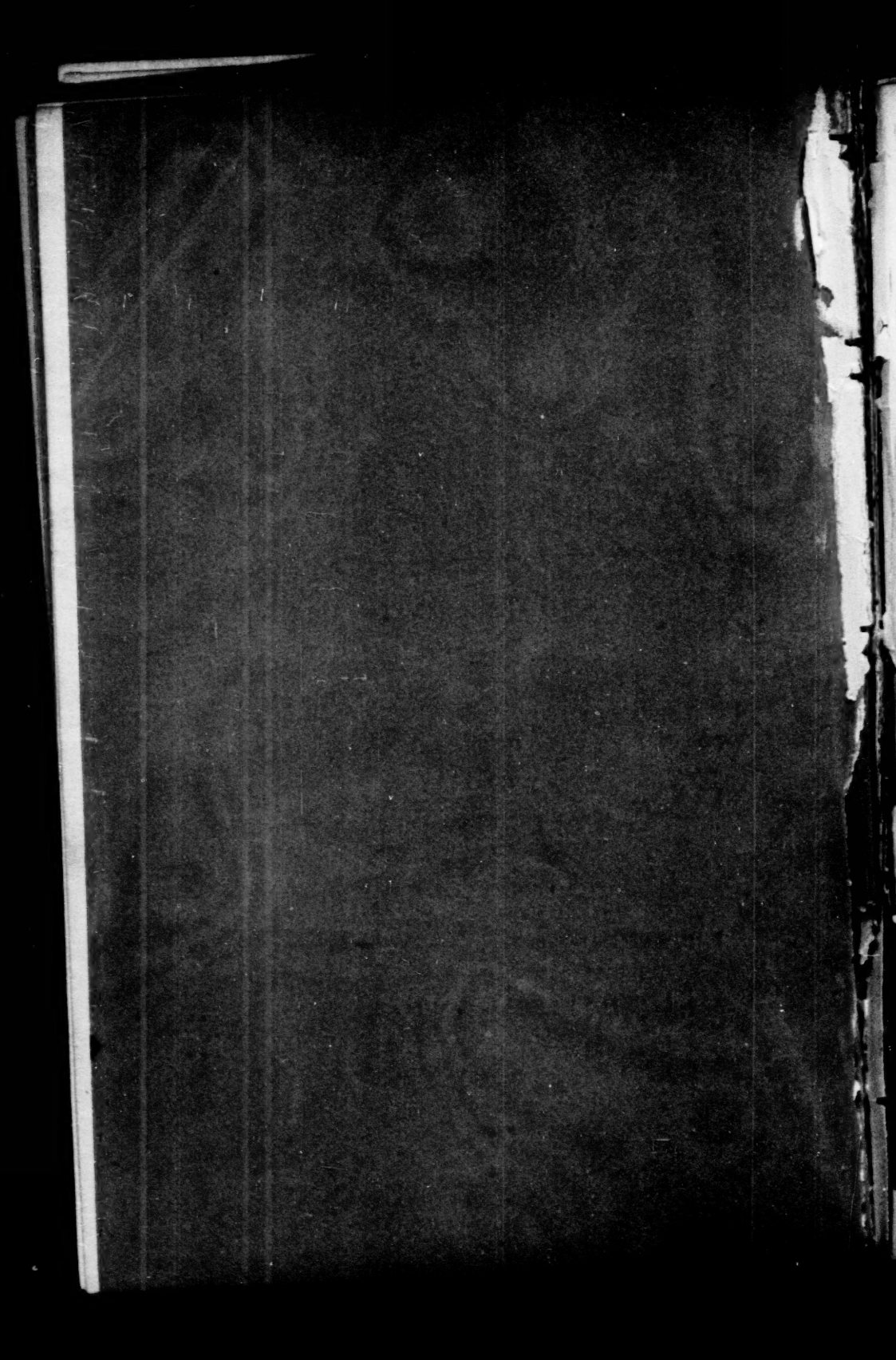
B. HUNTINGTON WRIGHT, PLAINTIFF IN ERROR,

vs.

LEVI BLAKESLEE (LATE COLLECTOR OF INTERNAL REVENUE).

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 6, 1877.



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To the honorable the circuit court of the United States of America for the northern district of New York:

The petition of Levi Blakeslee, of the city, county, and State of New York, respectfully shows that your petitioner was from, on, or, about the 19th day of April, A. D. 1867, until on or about the 20th day of May, A. D. 1873, an officer of the United States, appointed under and acting by authority of the revenue laws thereof, to wit, collector of internal revenue for the 21st collection district of New York, and stationed at Utica, within said collection district, and within the northern district of New York, and within the jurisdiction of your honorable court; that on the 24th day of June, 1875, at the city of New York, and within the State of New York, your petitioner was personally served with a summons issued out of the county court of the county of Oneida, in the State of New York, and within the northern district of New York, and within the jurisdiction of your honorable court, wherein one B. Huntington Wright is named as plaintiff and your petitioner as defendant; that the venue of said action is the county of Oneida in said judicial district; that by such service a civil suit has been commenced in
2 said county court of the county of Oneida against your petitioner; that as your petitioner is informed and believes a copy of the complaint in said suit was received by Richard Crowley, of Lockport, New York, your petitioner's attorney and counsel, on the seventh day of September, A. D. 1875; and that said suit has not been tried nor finally heard, but is now pending in said county court of the county of Oneida.

And your petitioner further shows that the grounds of said suit, as stated in said complaint, are, in substance, that in July, 1867, Charles M. Dennison, assessor of said 21st collection district, assessed against the said B. Huntington Wright and one Henrietta H. Wright, a succession tax under the internal revenue laws of the United States upon certain real estate devised to the said Wrights, and also a certain penalty for refusing to make returns, and certain expenses, amounting in the aggregate to $595.59; that said assessment was returned by said assessor to your petitioner as such collector; that your petitioner demanded of and from the said plaintiff and Henrietta H. Wright, and compelled them to pay the said sum of money, which was paid under protest; that said assessment and collection was wrongful and void, and without color of law, and that said Henrietta H. Wright has
3 duly sold and assigned to said plaintiff all her right and interest in said claim, and all right of action therefor.

And your petitioner further shows that the aforesaid alleged acts of your petitioner were done under color of his said office of collector of internal revenue, and under said revenue laws, and were lawfully and properly done by your petitioner in the proper discharge of his duty as such collector; and that the said sum of money was duly accounted for by your petitioner at the Treasury Department of the United States.

And your petitioner further states that the above are all the grounds upon which said suit was commenced.

Your petitioner therefore prays that a writ of certiorari may be issued out of this honorable court, directed to the said county court of the county of Oneida, requiring it to send into this honorable court the record and proceedings in said suit, and that the said suit may be re.

moved into this honorable court for trial, pursuant to the provisions of the statute in such case made and provided.

And your petitioner will ever pray, &c.

Dated September 9, 1875.

LEVI BLAKESLEE.

4 SOUTHERN DISTRICT OF NEW YORK,
County of New York:

Levi Blakeslee, of said county and district, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition; that he has read the same and knows the contents thereof; and that the same is true of his own knowledge except as to those matters therein stated on information and belief, and as to those matters he believes them to be true.

LEVI BLAKESLEE.

Sworn to before me this ninth day of September, A. D. 1875.

[L. S.] R. E. STILWELL,
Comm'r U. S. Circuit Court in & for the Southern District of New York.

NORTHERN DISTRICT OF NEW YORK, *ss:*

I, Richard Crowley, do hereby certify that I reside at Lockport, Niagara County, in said district; that I am a counselor at law in the supreme courts of the State of New York, and also in the circuit and district court of the United States for the northern district of New York; that as counselor for the above-named petitioner I have examined the proceedings against him, and have carefully inquired into all the
5 matters set forth in the foregoing petition, and that I believe the same to be true.

Dated Sept. eighth, 1875.

RICHARD CROWLEY,
Counselor for Petitioner above named.

6 (Indorsed:) U. S. circuit court, northern dist. of N. Y. B. Huntington Wright vs. Levi Blakeslee. Petition for removal of the cause from Oneida County court. Richard Crowley, of counsel for def't, Lockport, N. Y. Filed Sept. 11, 1875.

7 United States circuit court, northern district of New York. Sept. 11, 1875.

B. HUNTINGTON WRIGHT
vs.
LEVI BLAKESLEE.

On filing petition of Levi Blakeslee, petitioner in this case, and on motion of Richard Crowley, attorney for said petitioner, it is ordered that a writ of certiorari do issue in duplicate out of and under the seal of this court removing this cause from and out of the county court of Oneida County, New York, into this court.

8

9 The President of the United States of America to the county court of the county of Oneida, in the State of New York, greeting:

Being informed that there is now pending before you a suit in which B. Huntington Wright is plaintiff and Levi Blakesly is defendant, which said suit was commenced in said county court against the said Levi Blakeslee for and on account of acts done by him under color of his office of collector of internal revenue for the 21st collection district of New York, and under the revenue laws of the United States; that said suit was commenced by summons, and that said suit has not been tried, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said court and removed into our circuit court of the United States in and for the northern district of New York, do hereby command you that you send without delay to the said circuit court as aforesaid the record and proceedings in said cause, so that the said circuit court may act thereon as of right and according to law ought to be done.

10 Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Utica, this 13th day of September, A. D. 1875.

[L. S.] CHARLES MASON, *Clerk.*

RICHARD CROWLEY,
Counselor for Petitioner.

United States circuit court, northern district of New York.

I certify that on the 15th day of September, 1875, at Utica, I personally served the within writ on James B. Paddon, clerk of the county court of the county of Oneida, by delivering to and leaving with him a true copy of said writ.

I. F. QUIMBY,
U. S. Marshall,
By THOM'S HIGGISON,
Deputy.

11, 12 (Indorsed) U. S. circuit court, north. dist. of N. Y. B. Huntington Wright vs. Levi Blakeslee. Certiorari. Richard Crowley, counselor for petitioner. Filed Sept. 22, 1875.

13 The return of James B. Paddon, county clerk of the county of Oneida, and clerk of the county court of said county, to the writ of certiorari issued on the application of Levi Blakeslee to remove into the circuit court of the United States for the northern district of New York a certain civil suit wherein said Blakeslee is defendant and one B. Huntington Wright is the plaintiff.

By virtue of and in obedience to the said writ of certiorari issued out of the circuit court of the United States for the northern district of New York, and to me directed and delivered, I do hereby certify and return to the said court that I do not find any papers, records, or pleadings on file in my office entitled in said action; all of which I do hereby certify and return, as by said writ I am commanded.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Utica, in said county, this 16th day of September, A. D. 1875.

[L. S.] JAMES B. PADDON,
County Clerk and Clerk of the County Court.

14 (Indorsed:) U. S. circuit court, northern district of N. Y. B. Huntington Wright vs. Levi Blakeslee. Return of county clerk of Oneida Co. and clerk of co. court to writ of certiorari. No papers returned. Filed Sept. 18, 1875.

15 County court. Oneida County

B. HUNTINGTON WRIGHT
ag'st
LEVI BLAKESLEE.

The plaintiff for a cause of action against the defendant avers and says that plaintiff and defendant are and were at the time of the commencement of this action residents of the county of Oneida.

Plaintiff further says, upon his information and belief, that Henry Huntington, in the year 1842, was the owner in fee of certain premises in the county of Oneida, situate in Rome in said county. That on or about the 7th day of May, 1842, being such owner in fee simple, he made and executed his last will and testament, in and by which he gave and devised to his daughter Henrietta the use or income of said real estate during her natural life, and at her desease the same was devised to the heirs of her body her surviving in fee simple.

That thereafter said Huntington died, and said bill was duly admitted to probate as a will of personal and real estate, on the 27th day of October, 1846, in and by which said will said Henrietta became entitled to the income or use of said real estate during her natural life. That said

16 Henrietta departed this life in or about the month of September, 1865, at Rome, N. Y., leaving her surviving as heirs entitled to take under said will this plaintiff and Henrietta H. Wright, they being the sole heirs entitled to said real estate under said will.

That thereafter, and on or about the 13th day of July, 1867, Charles Dennison, the acting assessor of internal revenues in and for the 21st collection district of New York, in violation of his duty and the law in such case made and provided, did impose and assess succession tax against the said heirs, Henrietta H. Wright and this plaintiff, which assessment was claimed to be made in pursuance of the act of Congress entitled "An act to provide internal revenue and to support the government, &c.," passed July 13th, 1866, and the acts supplementary thereto and amendatory thereof, and which assessment was levied as a succession tax so called, and was wrongful and void, and made without color of law.

That said assessment also imposed a pretended penalty in addition to the tax, as follows:

Tax	$389 56
Penalty for refusing to make returns	$194 78
Expenses	$ 11 25
Total	$595 59

That said assessment and tax so imposed was returned to the collector of said district, the defendant herein, who demanded said tax

17 from plaintiff and said Henrietta H. Wright, and threatened to and did compel the payment thereof from said parties.

That said defendant wrongfully demanded and obtained from plaintiff and said Henrietta H. Wright, against their wishes and consent, the

sum of $595.59, which said sum was paid by said parties under their protest.

That prior to the commencement of this action the said Henrietta H. Wright for value duly sold and assigned all her right and interest in said claim and demand, and all right of action therefor to this plaintiff, who therefore became and now is the owner thereof.

Second. For another and separate cause of action the plaintiff repeats the foregoing allegations, and makes the same a part hereof, and further says defendant is justly indebted to him for money had and received from the plaintiff and one Henrietta H. Wright in the sum of $595.59, which defendant became liable and agreed to pay, but has failed and neglected to pay the same, though often requested to do so.

That prior to the commencement of this action the said Henrietta H. Wright duly sold and assigned her interest in and to said claim and demand, and all rights of action therefor, to this plaintiff, who there-
18 upon became and still is the owner thereof.

Wherefore plaintiff demands a judgment herein against the defendant for five hundred ninety-five $\frac{59}{100}$ dollars, with interest thereon from the 20th day of July, 1867, with costs of this action.

RISLEY, STODDARD AND MATTESON.
Pl'ff's Att'ys, Utica, N. Y.

ONEIDA COUNTY, *ss:*

B. Huntington Wright, being duly sworn, deposes and says he is the plaintiff in this action; that he has heard the foregoing complaint read, and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true.

B. HUNTINGTON WRIGHT.

Sworn to before me September 3d, 1875.

C. S. GRIFFIN,
Notary Public Oneida County.

19

20 (Indorsed:) Oneida Co. court. B. Huntington Wright ag'st Levi Blakeslee. Copy complaint. Risley, Stoddard & Matteson, pl'ff's att'ys, to Richard Crowley, esq., def'ts att'y. Rec'd by mail Sept. 7, 1875.

21 Circuit court of the United States, northern district of New York.

B. HUNTINGTON WRIGHT
ag'st
LEVI BLAKESLEE.

The defendant, Levi Blakeslee, for answer to the complaint of B. Huntington Wright, the plaintiff in above-entitled action, denies each and every allegation in said complaint contained.

Second. And for a further answer to said complaint this defendant says that Charles M. Dennison, in said complaint mentioned, was the assessor of internal revenue, and defendant was the collector of internal revenue for the twenty-first internal revenue district, in the State of New York, at the times set forth in the plaintiff's complaint in the above-entitled action.

That the said Dennison made the assessment at the time set forth in said complaint, and in the performance of his official duty, as such assessor, and in conformity to the Statutes of the United States, in such case made and provided, and transmitted the same to this defendant, as such collector, for collection. And this defendant thereupon and as such collector demanded and received payment thereof from said
22 plaintiff and one Henrietta H. Wright, and thereupon and before the commencement of this action this defendant paid the same, as such collector, into the Treasury of the United States.

Third. And for a further answer to said complaint this defendant says that said plaintiff ought not to have or maintain this action, for the reason that said assessment was paid on the thirtieth day of July, A. D. 1867, and no suit or proceeding for the recovery thereof was brought within two years thereafter, and for the further reason that no suit or proceeding for the recovery thereof was brought within one year from the sixth day of June, A. D. 1872.

Fourth. And for a further answer to said complaint this defendant says that said plaintiff ought not to have or maintain this action, for the reason that said plaintiff presented to the Commissioner of Internal Revenue, on the thirteenth day of December, A. D. 1872, a claim for the repayment or refunding of said tax, and said claim was by such Commissioner rejected on the fourteenth day of June, A. D. 1873, and more than one year had expired after such rejection before the commencement of this action.

Dated Sept. 27th, 1875.

RICHARD CROWLEY,
Attorney for Defendant.

23

24 (Indorsed:) U. S. circuit court, northern dist. of N. Y. B. Huntington Wright ag'st Levi Blakeslee. Answer. Richard Crowley, att'y for def't, Lockport.

Personal service of within answer is hereby admitted.
Sept. 28th, 1875.

RISTEY, STODDARD & MATTESON,
Att'ys for Pl'ff.

25 Circuit court of the United States for the northern district of New York.

B. HUNTINGTON WRIGHT
ag'st
LEVI BLAKESLEE.

The plaintiff, for a reply to the defendant's answer herein, saving to himself all manner of objections to the manifold insufficiencies of the said answer herein, and without waiving any objections thereto, alleges that the plaintiff and Henrietta Wright presented to the Commissioner of Internal Revenue a claim for and demanded the repayment of said tax and claim, and that the same was rejected by said Commissioner; that said action was commenced within one year after the rejection of said claim and notice thereof to the plaintiff.

Wherefore plaintiff demands judgement as in the complaint mentioned.

RISTEY, STODDARD & MATTESON,
Pl'ff's Att'ys, Utica, N. Y.

26 (Indorsed:) United States circuit court. B. Huntington Wright ag'st Levi Blakeslee. Pl'ff's reply. Ristey, Stoddard & Matteson, pl'ff's att'ys, Utica, N. Y. Filed Oct. 11, 1875.

27 United States circuit court, northern district of New York.

B. HUNTINGTON WRIGHT
vs.
LEVI BLAKESLEE.

A trial by jury in the above-entitled action is hereby waived, and it is hereby stipulated and agreed that the same be tried by the court with the same force and effect as if tried by a jury, and that a verdict and judgement therein may entered as if the same was tried by a jury.

Dated January 21st, 1876.

RISLEY, STODDARD & MATTESON,
Att'ys for Pl'ff.
RICHARD CROWLEY, *Att'y for Deft.*

28 (Indorsed:) U. S. circuit court, northern district of N. Y. B. Huntington Wright vs. Levi Blakeslee. Stipulation that the case be tried by the court. Filed Jan. 22, 1876.

29 At an adjourned term of the circuit court of the United States of America, for the northern district of New York, in the second circuit, held at the City Hall in the city of Albany, on Saturday, the 22d day of January, in the year of our Lord one thousand eight hundred and seventy-six,

Present, the honorable William J. Wallace, judge; E. H. Risley for pl'ff; Richard Crowley for def't.

B. HUNTINGTON WRIGHT
vs.
LEVI BLAKESLEE.

On filing stipulation filed by the at'orneys for the respective parties, ordered that a trial by jury in the above-entitled action be and is waived, and that the same be tried by the court with the same force and effect as if tried by a jury, and that a verdict and judgement therein may be entered as if the same was tried by a jury.

Mr. Risley opens case for plaintiff.

Plaintiff's witness, B. Huntington Wright.

Mr. Crowley argues case for defendant.

Mr. Risley argues case for plaintiff.

Decision reserved.

Points to be submitted within thirty days.

30

31 United States circuit court, northern district of New York.

B. HUNTINGTON WRIGHT
vs.
LEVI BLAKESLEE.

This action having been brought on for trial at an adjourned term of this court, held at the city of Albany, in and for said district, on the third Tuesday of January, 1876, and a trial by jury having been waived by the stipulation of the parties filed, and the action having been tried before the undersigned, the judge of said court presiding at such trial, after hearing the evidence and argument of counsel I find and decide as follows:

On the 7th day of May, 1842, Henry Huntington, a resident of Oneida County, N. Y., made his will, which was executed in due form and in conformity to the laws of New York.

On the 11th day of October, 1846, the testator, Henry Huntington, died.

On the 29th day of October, 1846, the will was in due form of law admitted to probate as a will of personal and real estate. By the will Benjamin A. Huntington, Edward Huntington, and Hiram Denio were made executors.

32 The third bequest in the will directed that all of the rest, residue, and remainder of his personal and real estate, of every kind and description, "be divided into five equal parts or shares." The seventy bequest disposed of one of said five shares, as follows: "In case, therefore, my said daughter Henrietta shall at the time of my decease be femme covert, I give and devise unto my executors hereinafter named, one other of the said equal parts or shares of the residue of my estate, in trust, to receive the rents and profits of such parts thereof as shall be in real estate," &c., "and to apply the said rents, income," &c., "to the sole and separate use of my daughter Henrietta during the term of her natural life"; "and at the decease of my said daughter Henrietta, if she shall leave issue her surviving and living at the time of her death, I do give, devise, and bequeath the said part or share to such issue, to hold to them, their heirs and assigns and legal representatives, in full and absolute possession, the issue, if more than one, taking in such shares and proportions as they would have taken under the laws of descents and distribution, providing Henrietta had been seized of the inheritance."

33 In case she died without issue, then the will directed it to be divided between other parties. At the time of Henry Huntington's death, Henrietta D. Wright, the devisee named in the seventh clause of the will, was a femme covert and had a son, the plaintiff, and a daughter. Henrietta D. Wright died in September, 1865, leaving her two children her surviving, Benjamin H. Wright, husband of the devisee and father of the two children, from the death of his wife had sole charge of the estate, and especially the subject of the succession tax.

On the 25th day of June, 1867, the assessor of internal revenue of the twenty-first district notified the son and daughter that they were required to make a return to the assessor as required by the 14th section of the act of 1864, and thereafter they both refused and declined to make any return or give any knowledge or information as to the quantity, location, or value of the real estate; that hereafter the assessor issued a summons, pursuant to section 14th of the act, which was duly served; and thereupon B. Huntington Wright and Henrietta D. Wright, by her

father, B. H. Wright, appeared before the assessor and claimed that the estate was not liable to assessment for a succession tax. The assessor overruled the objection and proceeded and assessed a tax of one
34 per cent. upon the full value of the real estate mentioned in the seventh clause of the will, and added thereto a penalty of fifty per cent. and expenses of the proceedings.

In June, 1867, the assessor notified the parties of the tax unpaid, the value of the property, and the penalty affixed. The assessment or tax was placed upon the assessment roll and *and* apportioned to each of the parties.

On the 20th day of July, 1867, the collector to whom the tax assessed, including the penalty, had been forwarded for collection, notified the parties that they must pay the tax in ten days or an additional penalty would be imposed.

On the 31st of July, 1867, the parties paid the tax under protest, the tax paid amounting to $595.59, of which $389.56 was tax, $194.78 was penalty, and $11.25 was the expenses for making the assessment and valuation. The amount assessed upon each, viz, B. Huntington Wright and Henrietta H. Wright, was $297.29.

On the 5th of October, 1872, the Commissioner of Internal Revenue wrote the parties that the claim to have the tax refunded had not been submitted to the department, and forwarded them a blank to be
35 filled up and transmitted to the department, and they would then pass upon the case upon its merits.

About the 3d of January, 1873, the appeal was perfected and filed with the Commissioner.

On the 3d of July, 1873, the Commissioner rendered his decision upon the merits, rejecting the whole claim, and gave notice thereof.

On the 15th of June, 1875, Henrietta D. Wright, one of the parties against whom one-half of the tax had been levied and collected, transferred her claim to the plaintiff.

On the same day a summons was delivered to the sheriff of New York to serve on defendant.

On the 24th of June, 1875, the summons was actually served on defendant. The action was originally brought in the State court, but was removed into this court upon proceedings had under the statute.

And upon the foregoing facts I find and decide as matter of law, that the said tax and penalty was properly assessed and collected, and that the plaintiffs ought not to have or maintain this action.

And I order judgement for the defendant.

W. J. WALLACE.

(Indorsed:) United States circuit court, north. dist. of N. Y.
36 B. Huntington Wright vs. Levi Blakeslee. Order for judgement. Filed June 20th, 1876.

37 United States circuit court, northern district of New York.

B. HUNTINGTON WRIGHT
vs.
LEVI BLAKESLEE.

SEPTEMBER 19, 1876.

This cause having been duly removed from and out of the county court of the county of Oneida, in the State of New York, into this court, and the issues joined herein having been brought on for trial at the Jan-

uary adjourned term of said circuit court, held at the city of Albany on the 22d day of January, 1876, before the honorable William J. Wallace, judge, and a stipulation of the attorneys of the respective parties waiving a trial by jury having been filed, and the case having been tried by the court and decision reserved; and at the June term of said circuit court, held at the village of Canandagua on the 20th day of June, 1876, the court having filed its findings in said action and having ordered judgement for the defendant: Now, on motion of Richard Crowley, attorney for the defendant, it is ordered and adjudged that the defendant, Levi Blakeslee, do recover of the plaintiff, B. Huntington
38 Wright, the sum of one hundred and thirty-five dollars and thirty cents for his costs and disbursements in this suit as taxed, and that execution issue therefor, &c.

Judgement signed this 19th day of September, A. D. 1876.

CHARLES MASON, *Clerk.*

(Indorsed:) U. S. circuit court, northern dist. of N. Y. B. Hunt-
39 ington Wright vs. Levi Blakeslee. Judgement record. Richard Crowley, def't's att'y. Costs, $135.30. Filed Sept. 19, 1876, 3 o'clock p. m.

40 United States circuit court, northern district of N. Y.

B. HUNTINGTON WRIGHT
against
LEVI BLAKESLEE.

The plaintiff above named hereby excepts to the decision of the court made and filed in this case June 30, 1876, and notice of such filing given on the 18th day of September, 1876, and the following is the grounds of such exception:

First. The plaintiff excepts to so much of the finding or conclusions of law contained in said decisions as follows: "I find and decide as matter of law that the said tax and penalty was properly assessed and collected, and that the plaintiff ought not to have or maintain this action, and I order judgment for the defendant." The foregoing decision is excepted to, and to the whole & each & every part thereof; whereas said court should have found and decided that the tax and penalty were illegally and improperly assessed, levied, and collected, and that the plaintiff was entitled to recover judgment for the amount levied and collected, with interest, and judgment should have been so ordered by the court.

RISLEY, STODDARD AND MATTERSON,
Solicitors for Pl'ff, Utica, N. Y.

To RICHARD CROWLEY, Esq.,
Solicitor for Def't, and
CHARLES MASON, *Clerk.*

(Indorsed:) United States circuit court. B. Huntington Wright ag'st Levi Blakeslee. Copy exceptions. Copy mailed Oct. 13, 1876; copy filed Oct. 13, 1876. Risley, Stoddard and Matteson, pl'ff's att'ys, Utica, N. Y.

Please to take notice that the within is a copy of exception filed in this case to the decision of the court.

Yours,

R., S. & M.

To R. CROWLEY, Esq.

Filed Oct. 13, 1876.

41 *Bill of exceptions.*

Circuit court of the United States, northern district of New York.

B. HUNTINGTON WRIGHT, PLAINTIFF,
ag'st
LEVI BLAKESLEE, DEFENDANT.

Be it remembered, that this action was duly commenced in the county court of the county of Oneida, in the State of New York, and in the northern district of said State, by the service of a summons upon the defendant on behalf of the plaintiff, in accordance with the laws of said State and the rules and practice of said county court, and within twenty days after the service thereof the defendant duly appeared therein by Richard Crowley, esq., his duly authorized attorney, and a copy of the complaint of the plaintiff was duly served upon said attorney, and that immediately thereafter, upon the application of the defendant and upon motion of his attorney, the said action so commenced as aforesaid was duly removed by an order of the circuit court of the United States for the northern district of New York into this court.

That thereafter the said defendant duly served an answer to the said complaint and filed the same in this court, and which answer
42 made and raised an issue of fact.

That said issue of fact so raised and made as aforesaid duly came on to be tried and was tried at a circuit court of the United States for the northern district of New York, held at the court-room in the city hall in the city of Albany and State of New York, on the third Tuesday of January, 1876, before the Hon. William J. Wallace, judge of said court, and without a jury (a jury trial having been duly waived by the written stipulation, signed by the parties and filed with the clerk of this court), and was duly tried and determined by said judge holding said court as aforesaid. (The summons, complaint, answer, and stipulation to try said action before the court, and the court's findings and decision, will be found in judgement record attached to this bill of exceptions.)

The plaintiff, to maintain the cause of action on his part, offered in evidence a duly certified copy of the last will and testament of Henry Huntington, of Oneida County, New York, d'ted May 27, 1842, and the probate of the same before the surrogate of Oneida County. The same was received in evidence, and the third and seventh clause of the same were the only provisions that related to this controversy. The parts of said will relating to this controversy were then read in evidence, and are as follows:

43 The third bequest in the will directed that "all of the estate, residue, and remainder of my personal and real estate of every kind and description be divided into five equal shares or parts."

The seventh bequest disposed of one of said five shares as follows: "In case, therefore, my said daughter Henrietta shall at the time of my decease be femme covert, I give and devise unto my executors hereinafter named one other of the said equal parts or shares of the residue of my estate in trust, to receive the rents and profits of said parts thereof as shall be in real estate, &c., and to apply the said rents, income, &c., to the sole and separate use of my daughter Henrietta during the term of her natural life, and at the time of the decease of my said daughter Henrietta, if she shall leave issue her surviving and living at the time of her death, I do give, devise, and bequeath the said part

or share to said issue, to hold to them, their heirs and assigns and legal representatives in full and absolute possession, the issues, if more than one, taking in such shares and proportions as they would have taken under the laws of descent and distribution providing Henrietta
44 had been seized of the inheritance." In case she died without issue, then the will directed it to be divided between other parties.

The will named Benjamin Huntington, Edward Huntington, and Hiram Denio as executors of the will.

No other parts or portions of the will related to the controversy, and were not therefore read in evidence.

The proofs of the will attached and read in evidence showed that Henry Huntington, the testator, died October 11, 1846, at Rome, N. Y. They also showed the said will containing the foregoing provission was duly admitted to probate by and before the surrogate of Oneida County as the last will and testament of the deceased, on the 29th day of October, 1846, as a will of personal and real property, in conformity to the laws of New York.

Benjamin H. Wright was then called as a witness for the plaintiff, and after being first duly sworn, testified as follows: I am the father of the plaintiff. I knew Henry Huntington in his life. I married his daughter Henrietta Huntington. We were married before Henry's death, and before the will was made. My wife was the same person desig-
45 nated as devisee in the seventh clause of the will. At the time of Henry Huntington's decease my wife had two children living. They were the only children we ever had. The plaintiff was one, and the other was a daughter, Henrietta H. Wright. They are both now living. My wife died in September, 1865. Since the death of my wife I have had full chage of the estate or property that went to my children under the will.

My son and daughter were notified by the assessor of internal revenue for the 21st district of N. Y. that they were required to make a return under the 147 section of the act of 1864. I appeared before him on the return day of the notice and claimed that the property was not liable for a succession tax. I declined to make the return to him, because I claimed the estate not liable to pay a succession tax, and to save our legal rights I received this notice from him of the assessment. It is the assessor's handwriting.

(It was here offered and read in evidence, and was as follows:)

ASSESSOR'S OFFICE, UNITED STATES INTERNAL REVENUE,
21ST COLLECTION DISTRICT, STATE OF NEW YORK,
Rome, June 13, 1867.

B. HUNTINGTON WRIGHT, HENRIETTA H. WRIGHT:

46 After taking testimony and hearing evidence relating to the location, quantity, and value of the real estate to which you are entitled and have succeeded under the will of Henry Huntington, upon the death of Mrs. B. H. Wright, I find that the value of such estate, after all proper deductions, is $38,955.58, upon which and for the same I have assessed this day a tax against you of $389.56, and for neglecting and refusal to make return I have added a penalty of 50 per cent., amounting $194.78. I have also, in addition, assessed the expenses incurred in ascertaining the value of such real estate, amounting to $11.25. Total tax, $595.59.

Yours, &c.,

C. M. DENNISON,
Assessor 21 *Dist.*

The witness continued: On the 21st day of July, 1867, the collector of internal revenue of the 21st district notified my son and daughter that they must pay the tax assessed in ten days, or an additional penalty of five per cent. would be imposed.

On the 31st day of July, 1867, I paid the tax and penalty to the collector. I paid it under protest. I stated to him that the tax was illegal and he had no right to demand or receive it. He said he could
47 not help it; it must be paid. I then paid the amount and took the receipts.

(The receipts were here offered and read in evidence, and are as follows:)

UNITED STATES INTERNAL REVENUE,
COLLECTOR'S OFFICE, 21ST DIST. OF NEW YORK,
Rome, July 31, 1867.

Received B. Huntington Wright, executor of the estate of Henry Huntington, $299.99, for excise tax, amount assessed on monthly list from June, 1867.

J. S. THOMAS, *Collector.*

The above was paid under verbal protest. The other receipt was like this, except it was for the tax of Henrietta Wright, and was for the same amount.

The witness continued: The amount of tax paid was $595.59. An appeal from the assessment was taken. I had charge of the appeal. There were some delays and argument in the appeal.

On or about the 5th of October, 1872, I received this letter from the Commissioner of Internal Revenue.

(The same was here offered, read in evidence, and was as follows:)

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, Oct. 5th, 1872.

I reply to yours of the 20th inst., that without a claim properly made on Form 46, stating the facts of the case under oath, duly certified,
48 as the form requires, and filed here, no definite decision can be made. It does not appear that you have filed such a claim. At least none appears on the register or files of this office. Should you file a claim thus prepared it will be considered and decided on its merits. Enclosed please find blank Form 46.

Yours, respectfully,

B. JARRETT SWEET,
Act. Com.

To B. HUNTINGTON WRIGHT.

The witness continued: Some time after the 1st of January, 1873, the appeal papers referred to in the letters were filled up, executed, and forwarded to the department in pursuance of this letter.

The plaintiff here offered and read in evidence a duly authenticated copy of the appeal and papers accompanying it, as suggested by the foregoing letter of the Commissioner of Internal Revenue, by B. Huntington Wright and Henrietta H. Wright, to the Commissioner of Internal Revenue of the United States, from the assessment of said succession tax and said penalty of fifty per centum by the said assessor of the 21st district of N. Y. aforesaid, and specifying the following grounds, viz:

"First. That in respect to the propriety of said assessment, this was wholly illegal; no authority being given under the revenue law
49 of the United States to make such assessment if the testator or person or owner died before the passage of the law, as is set forth in the papers attached to the appeal, giving the correct interpretation of the law.

"Second. That the amount aforesaid embraced as penalty, of fifty per cent., is contrary to the provisions of law in any case, the law limiting the liability to a penalty of ten per cent. where there is wilful negligence."

The said appeal was made to said Commissioner of Internal Revenue aforesaid, and duly filed in his office about the third day of January, 1873.

The witness continued: Some time in July, 1873, we received this letter (received and read in evidence, and is as follows):

UNITED STATES INTERNAL REVENUE,
COLLECTOR'S OFFICE 21ST DIST. N. Y.,
Utica, July 3, 1873.

B. H. WRIGHT:

SIR: Yours of the 3d inst. received. I furnish you, as you desire, the information sent me in reference to your suit.

(Copy.)

"Refunding tax claim B. H. and H. H. Wright, for $1,017.93, is rejected, as it appears that the tax was due and properly assessed.

(Signed) "J. W. DOUGLASS,
"*Commissioner.*"

This is all the information I have on the subject.

Very respectfully, yours,

J. C. P. KINCAID.

50 Witness continued: I am acquainted with the handwriting of my daughter, Henrietta H. Wright. She executed paper shown witness. I saw her sign it at about the time it bears date.

(The same was offered, received, and read in evidence, and is as follows):

I, Henrietta H. Wright, in consideration of value received therefor, do hereby sell, assign, and set over to B. Huntington Wright all my right, title, and interest in and to all claims and demands existing in my favor and against the Government of the United States or Levi Blakeslee and growing out of a tax and assessment illegally levied against me or my property by Charles M. Dennison on or about July, 1867, and collected by Levi Blakeslee, to have and hold the same forever.

Dated June 13, 1875.

HENRIETTA H. WRIGHT.

It was admitted in open court that the summons issued in the State court was, on or about the 15th day of June, 1875, delivered to the sheriff of N. Y. County, where the defendant then resided, and with instructions to serve the same, and that the same was actually served on the 24th day of June, 1875. That this case was removed from the State court to this court by proceedings had and taken under the

51 statute. That the defendant was the collector of internal revenue of the 21st district of N. Y. at the time the tax was demanded and received from plaintiff and his sister, and that said collector paid the same over to the proper officer of the United States.

The plaintiff here rested his case.

The defendant, to maintain his part of the issue, offered in evidence the original assessment records or proceedings had before the assessor when the property was assessed for the tax complained of.

The same was received and read in evidence and marked defendant's Ex. C, and is as follows:

DESCRIPTION OF REAL ESTATE.

List of lands conveyed to B. Huntington Wright and Henrietta H. Wright, only children of Mrs. B. H. Wright, deceased, under partition deed made June 8th, 1867, by parties deriving an interest therefrom under the will of the late Henry Huntington, who died Oct., 1846, and are the premises and lands which said B. Huntington Wright and Henrietta H. Wright are entitled to and received under the will aforesaid on the death of their mother, Mrs. B. H. Wright, which occurred in Sep., 1865.

A parcel of land in the city of Utica, bounded on the north by
52 lands appropriated and taken by the State of New York for the purposes of the Erie Canal; on the west by a line formed by extending the entire line of State street on the same course from its northern termination northerly to said lands appropriated by the State for the Erie Canal; on the east by the westerly line of land heretofore conveyed by the executors of the said Henry Huntington to Wm. D. Hamlin; and on the south by the northerly line of Rome street and by a line formed by extending said line of Rome street from its western termination westerly on the same course to the said line formed by extending the center lines of State street, valued and appraised at $9,000.

Also the following lots and parts of ground and blocks and parts of blocks, as the same are laid down on a map of part of Cosley manor, in the city of Utica, the property of Henry Huntington, made by L. M. Taylor in 1847, and now on file in the clerk's office of the county of Oneida, namely: the whole of block number one, except lots numbers one, two, and three, as laid down on said map, valued and appraised at $7,000.

Lots No. 12 and thirteen, in block number four, valued at $1,200 each, $2,400.

Lot' Nos. 5, 6, and 12, in block No. 14, valued at $400 each, $1,200.

53 Lots Nos. 9 and 10, in block No. 18, and twelve feet in front and rear of the southerly side of lot No. 8, in said block No. 18, valued at, total, $800.

Lots Nos. 1, 2, 3, 4, 5, 6, 7, in block No. 21, valued at $2,500.

Lot No. 6, in block No. 22, and 20 feet in front and rear of a piece of land lying southerly to and adjoining said lot No. 6, in said block No. 22, valued at $850.

Lots Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16, in block No. 23, being the whole of said block, valued at $4,250.

Lots Nos. 3 and 8, in block No. 26, and twenty-five feet in front and rear of the northerly side of lot No. 2, and 15 feet in front and rear of the southerly side of lot No. 4, in said block No. 26, valued at $1,950.

Lots Nos. 1, 2, 3, 9, 10, and parts of lots Nos. 4 and 8, in block No. 27; the part of said block No. 27, hereby conveyed, being otherwise described as follows, viz: Beginning at a point in the southerly of Chenango avenue, distant ten feet westerly from the corner on said avenue between lots Nos. 4 and 5, in said block No. 27, and running thence westerly along said avenue 175 feet to Havens st.; thence easterly along Havens street 225 feet to Hart street; thence northerly along Hart st. 88 feet, and thence northerly in a direct line to the place of beginning, valued at $1,800.

54 Lots Nos. 2, 3, 16, 17, and 18, in block No. 30, and all that part of lot No. 1, in said block No. 30, except a part thereof heretofore conveyed by said executions and trustees to be sold to John M. McCormick, the part hereby conveyed being in an irregular form in the south part of said lot, valued at $1,800.

Lots Nos. 3, 4, 16, 17, 19, and 20, in block No. 23, valued at $2,250.

Also all that certain other piece or parcel of land situated on Seneca st., in said city, being lot No. 6 as designated on the map made on the final decree of partition in the case of Theodore Pomeroy and others against Samuel B. Dakin and others, bounded on the west by Seneca st., on the south by lot No. 4, on the north by lot No. 8, and on the east by parts of lots Nos. 5 and 7, as said lots are laid down on said map, being 22 feet wide on the front and rear, and 80 feet deep, being premises included in a deed executed by Horace Butler and his wife to Henry Huntington, now deceased, dated Aug. 12, 1835, and which is on record in Oneida Co. clerk's office, in book No. 70 of deeds, at pages 355–6, valued at $1,200.

And also that certain other lot, piece, or parcel of land situated on the easterly side of Genesee street, in said city, with the store
55 situated thereon now occupied by Messrs. Moore and Sheldon, the street No. of which is 45 Genesee st., said lot being 16½ feet front on said Genesee st., and about 55 feet deep, and being the southerly half part of a lot, piece, or parcel of land conveyed to said Henry Huntington by Samuel Stocking and wife, by deed dated March 1st, 1833, and recorded in Oneida Co. clerk's office, in book 63 of deeds, pages 141, 142, valued at $5,000.

All the foregoing real estate was conveyed to said B. Huntington Wright and Henrietta H. Wright by deed of partition dated June 8, 1867, from the other devisees of said Henry Huntington, as a portion which said two devisees were entitled to as successors under the will of said testator on the death of their mother, Mrs. B. H. Wright.

Henry Huntington died in Rome, Oneida Co., N. Y., a resident therein, in Oct., 1846, having previously made his last will and testament, appointing Benjamin N. Huntington, Edward Huntington, of Rome, and Hiram Denio, of Utica, trustees and executors of said will. By said will and testament the testator divided his property, real and personal, into five equal parts or shares, and gave the same in trust to said execu-
tors and trustees, to be applied as mentioned in said will; one of
56 these shares or parts was by said will given to said executors and trustees in trust to receive the rents, issues, interest, income, and profits, and to apply them to the sole and separate use of Henrietta Wright, daughter of said testator and wife of B. H Wright, for and during the term of her natural life; and after her death, leaving issue, the said one fifth part of real and personal to go to and belong to the issue of said Henrietta Wright. The said Henrietta Wright died in Rome in Sept. 1865, leaving her surviving as her issue two children, viz, B. Huntington Wright and Henrietta H. Wright, both of full age,

and to whom all the real estate described in annexed paper has been conveyed.

In the year 1866 verbal notice was given to B. Huntington Wright to make return of the real estate to which he succeeded under the will of his grandfather, said Henry Huntington, but which he neglected to do. In the winter and spring months of 1867 frequent verbal notice was given to B. Huntington Wright to return as aforesaid or to give the assistant assessor of the 1st div., where said Wright resided, the facts or data upon which a return could be made out; all of which he neglected and refused to do.

In the month of May, 1867, a printed succession blank was sent
57 through the P. O. by said assistant to said B. Huntington Wright and to said Henrietta H. Wright, which said B. H. Wright acknowledged and admitted to have received, which notice on outside was filled up, requiring each of them to make return of succession; but they neglected to make return or to give any facts upon which a return could be made or based, or upon which an assessment could be made by the assessor.

On the 25th June, 1867, the said two devisees and successors having neglected to make a return of any of the real estate received by them under the will of said Henry Huntington, upon the death of their mother, Mrs. B. H. Wright, the undersigned issued a summons under s's 14 of the rev. act of 1864, and acts amendatory thereof, requiring said B. Huntington Wright and said Henrietta H. Wright to appear before me, at my office in Rome, in said co. and State, on the 27th of June, 1867, at 10 a. m., to give evidence and produce all books relating to the real estate which they were entitled to and had received as successors aforesaid from said Henry Huntington upon the death of the life tenant, Mrs. Wright; that said summons' hereto annexed
58 were personally served on each of said persons by L. E. Elmer, asst. assessor of said 1st div., where said B. Huntington Wright and Henrietta H. Wright then and now reside and resided on the death of said Mrs. B. H. Wright; that said summons was served by said Elmer on each of said persons on said 25th day of June, 1867, as appears from his certificate of service endorsed on back of each of said summons'; that on said 27th of June, said B. Huntington Wright appeared in person, and said Henrietta H. Wright appeared by her father, B. H. Wright, but both declined to make any return or to give any knowledge or information as to the quantity, location, or value of the real estate received by said two successors under and virtue of the will of said Henry Huntington upon the death of Mrs. B. H. Wright; that said matter was thereupon adj'd until 10 a. m. of July 1st, and summons issued returnable that and hour for Edward Huntington and B. N. Huntington, two of the executors and trustees of said will, to give testimony in relation to location, quantity, and value of said real estate. That on the said 1st of July the matter was again further post-
poned, neither of said two successors or any one in their behalf
59 appearing until 10 a. m. of July 8, 1867, and summons issued returnable that day for Geo. R. Perkins, real estate agent, at Utica, who appraised and valued the lands and real estate set off to said B. Huntington Wright and Henrietta H. Wright, as before stated; that on said 8th of July, 1867, said Geo. R. Perkins appeared and gave evidence as to the value of said real estate, and Edward Huntington appeared and gave evidence as to the value, location, and other matters relative to and connected with said real estate.

From which testimony it appears that the whole amount and value of real estate which the said Henry Huntington left at the time of his death and remained as such at the death of Mrs. B. H. Wright, and which said B. Huntington Wright and Henrietta H. Wright became entitled to as devisees and successors, and received as such under the last will and testament of said Henry Huntington upon the death of their mother, Mrs. B. H. Wright, is as stated in detail in paper hereto annexed, and amounts to the sum of forty-two thousand dollars ($42,000), upon which they are liable to a succession tax of one dollar upon one hundred dollars, said property being undivided and they being
60 joint owners; that they are and each of them is hereby assessed and taxed the sum of $1.00 on each $100 so entitled and received by them, and which tax amounts in the whole to $420, or $210 to each, which is hereby assessed and taxed against them and upon the lands and property belonging to them. And for neglect and failure to make return of said succession, 50 per centum upon said tax, pursuant to section 14 of the revenue act, is hereby added and assessed upon said persons, and the further sum of $11.25 is hereby assessed upon said B. Huntington Wright and Henrietta H. Wright, and added to said assessment, pursuant to section 147 of said revenue act, for and on account of a portion of the expenses made and incurred by procuring the attendance of said George R. Perkins in making said assessment and valuations.

From the foregoing the following recapitulation is made, and the amounts assessed and taxed upon said B. Huntington Wright and Henrietta H. Wright upon their lands and property received by them as successors as aforesaid, viz:

The whole value of real estate rec'd	$38,956 58
Tax upon same at $1.00 for $100	$389 56
The 50 per cent. penalty added	194 78
	$584 34
61 Add expenses for making assessment & valuation.	11 25
Total amount	$595 59
Amount assessed upon each	$297 79½

Dated July 13, 1867.

C. M. DENISON,
Assr. 21st Dist.

UNITED STATES OF AMERICA.

ASSESSOR'S OFFICE INTERNAL REVENUE,
21ST DIST. OF NEW YORK.
Rome, June 25, 1867.

By virtue of the authority vested in me by section 14 of an act entitled, "An act to provide internal revenue to support the Government, to pay interest on the public debt, and for other purposes, approved June 30, 1864, and the acts amendatory thereto, you are hereby summoned and required to appear before me at my office, over Pell's hardware store, in the village of Rome, county of Oneida and State of New York, on the 27th day of June, 1867, at 10 o'clock a. m. of the same

day, then and there to produce all books of accounts containing entries relating to the real estate or succession received by you from Henry Huntington, deceased, on the death of your mother, which you
62 may have in your possession, custody, or under your control, and to give evidence according to your knowledge respecting the liability of yourself to an excise duty or succession tax under the internal-revenue laws of the United States.

Failure to comply will make you liable to the penalty of a fine not exceeding one thousand dollars or imprisonment not exceeding one year, or both, at the discretion of the court, with costs of prosecution.

Rome.

(Signed) C. M. DENISON,
Assessor 21 *District of New York.*

To HENRIETTA H. WRIGHT.

STATE OF NEW YORK,
Oneida Co.:

I hereby certify that on the 25th day of June, 1867, in the 1st div. of the 21st collection district of N. Y., in the village of Rome, in said county, I served on Henrietta H. Wright, the within named, a true attested copy of within summons by delivery to said Henrietta H. Wright, in hand, such attested copy, and that I am asst. assessor of said division and dist., where said Henrietta H. Wright then and now resides.

L. E. ELMER,
Asst. Assessor.

63 UNITED STATES OF AMERICA.

ASSESSOR'S OFFICE INTERNAL REVENUE,
21 DISTRICT OF NEW YORK,
Rome, June 25th, 1867.

By virtue of the authority vested in me by section 14 of an act entitled "An act to provide internal revenue to support the Government, to pay interest on the public debt, and for other purposes," approved June 30, 1864, and the acts amendatory thereof, you are hereby summoned and required to appear before me at my office over Pell's hardware store in the village of Rome, county of Oneida, and State of New York, on this 27th day of June, 1867, at 10 o'clock a. m. of the same day, then and there to produce all books of accounts containing entries relating to the real estate or succession received by you from Henry Huntington deceased, on death of your mother, which you may have in your possession, custody or under your control, and to give evidence according to your knowledge, respecting the liability of yourself and Henrietta H. Wright, to an excise duty or succession tax under the internal revenue laws of the United States.

Failure to comply will make you liable to the penalty of a fine
64 not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, at the discretion of the court, with costs of prosecution.

Rome.

(Signed) C. M. DENISON,
Assessor 21 *District of N. Y.*

To B. HUNTINGTON WRIGHT.

STATE OF NEW YORK,
Oneida Co.:

I hereby certify that on the 25th day of June, 1867, in the 1st div. of

the 21 collection district of N. Y., in the village of Rome, in said county, I served on B. Huntington Wright, the within named, a true attested copy of within summons by delivering to said Wright, in hand, such attested copy; that I am asst. assessor of said div. and dist. where said Wright then and now resides.

L. E. ELMER,
Asst. Assessor.

Estate of Henry Huntington, Rome.

UNITED STATES INTERNAL REVENUE.

B. Huntington Wright and Henrietta H. Wright having neglected and refused to make return, as required by law, of real estate to
65 which the persons below of the town of Rome, in the county of Oneida, and State of New York, each has become entitled or in which he and she have an interest as a successor under the revenue laws of the United States, the title to the same being derived from Henry Huntington, late of the town of Rome, in the county of Oneida, and State of New York, predecessor, whose relationship to the successor was as stated below, I, Charles M. Denison, assessor of 21 collection dist. of New York, do hereby estimate and assess the same as follows:

Relationship of predecessor, grandfather.	Value of real estate.	Deduction claimed.	Clear value of interest.	Rate of duty.	Amount of tax.
B. Huntington Wright	19,478	.....	19,478	$1.00 on $100..	194 78
Add 50 per cent. penalty for refusing to make return	.....	.....	.....	.....	92 39
Add for expenses of making valuation on account such refusal	.....	.....	.....	.....	5 62
Henrietta H. Wright	19,478	.....	19,478	$1.00 on $100..	194 78
Add 50 per cent. penalty for refusal to make return	.....	.....	.....	.....	92 39
Add for expenses of making valuation on account such refusal	.....	.....	.....	.....	5 62
Total tax against B. Huntington Wright	.....	.....	297 79½	.....	.....
" " " Henrietta H. Wright	.....	.....	297 79½	.....	.....
Total amount of tax	.....	.....	.....	.....	$595 59

Dated July 13, 1867.

C. M. DENISON,
Asst. Assessor 21 *Dist. N. Y.*

66 The evidence here closed, and the court, after due deliberation, made and filed its decision, which will be found in the judgement record on which judgement was entered on the 18th day of Sep., 1876.

The following are the exceptions made, filed, and served to the findings of matters of law of the judge and court who tried the cause by the plaintiff, viz:

United States circuit court, northern district of N. Y.

B. HUNTINGTON WRIGHT *ag't* LEVI BLAKESLEE.

The plaintiff above-named hereby excepts to the decision of the court

made and filed in this case June 20, 1876, and notice of such filing given on the 18th day of September, 1876, and the following are the grounds of such exceptions.

First. The plaintiff excepts to so much of the finding or conclusion of law contained in said decision, as follows: "I find and decide, as matters of law, that the said tax and penalty was properly assessed
67 and collected, and that the plaintiff ought not to have or maintain this action, and I order judgement for the defendant." The foregoing decision is excepted to and to the whole and each and every part thereof; whereas said court should have found and decided that the tax and penalty were illegally and improperly assessed, levied, and collected, and that the plaintiff was entitled to recover judgement for the amount levied and collected with interest, and judgement should have been so ordered by the court.

RISTEY, STODARD AND MATTESON,
Att'ys for Plaintiff, Utica N. Y.

To RICHARD CROWLEY, Esq.,
Attorney for the Defendant.
CHARLES MASON, *Clerk.*

Filed and served October 13, 1876.

And afterwards the plaintiff having made and duly served on defendant's att'y a proposed bill of exceptions, and the defendant having failed to propose amendments thereto, but admits the correctness of the same, and the same having been settled and allowed:

68 Be it remembered that on this 25th day of November, 1876, the foregoing bill of exceptions was duly settled and allowed by the Hon. Wm. J. Wallace, judge of said court, as he deemed to be consistent with the truth and facts of the case; and it is ordered that the for'going "bill of exceptions" be filed with the clerk of the circuit court and attached to the judgement record entered in this action, and that the same be deemed a part and parcel of said judgement record, and be by the clerk of said circuit court returned with said judgement record and other proceedings in said action to the Supreme Court of the United States if at any time he shall he so commanded by a writ of error or other proceedings.

Witness my hand and seal this 25th day of November, 1876, at the city of Syracuse, N. Y.

WM. J. WALLACE,
U. S. Dist. Judge.

69 *Opinion of circuit judge.*

United States circuit court, northern district of New York.

B. HUNTINGTON WRIGHT }
agst. }
LEVI BLAKESLEE. }

Action of assumpsit brought in State court and removed here to recover amount of tax paid under protest, assessed upon the assignees of the plaintiff, as an income tax.

Defense, general denial and statute of limitations.

Trial by court without jury.

WALLACE, J.:

Section 127 of the act of June 30, 1864, provides that every past or future disposition of real estate by will, deed, or laws of descent by reason whereof any person shall become beneficially entitled, in possession or expectancy, to any real estate or the income thereof upon the death of any person dying after the passing of this act, shall be deemed to confer on the person entitled by reason of any such disposition a "successor," and the term "successor" shall denote the person
70 so entitled, and the term "predecessor" shall denote the grantor, testator, ancestor, or other person from whom the interest of the successor has been or shall be derived.

Section 133 declares: "There shall be levied and paid to the United States, in respect of every such succession as aforesaid, according to the value thereof, the following duties, namely: where the successor shall be the lineal issue or lineal ancestor of the predecessor, a duty at the rate of one dollar per centum upon such value."

The assignors of pl'ff were the children of Henrietta Huntington, a devisee under the will of her father, by reason of a provision in his will substantially as follows: "In case my daughter Henrietta shall at the time of my decease be femme covert, I give and devise unto my executors one other of the said equal parts or shares of the residue of my estate in trust, to receive the rents and profits and apply the same to her sole and separate use during the term of her natural life, and at her decease, if she shall have issue her surviving, I devise the said share to her issue, their heirs and assigns, in full and absolute possession." The testator died in 1846, said Henrietta being a femme covert. She
71 died after the passage of the income tax act. These being the facts, the assessor insisted upon payment of a tax of one dollar per centum on the value of the succession.

It seems very clear that by a past disposition of real estate by will, the assignors of the plaintiff had a vested estate in expectancy during the life of mother, and upon her death, after the act was passed, became beneficially entitled in possession to the real estate.

The concurrence of these conditions conferred upon the issue a succession and made them successors within the plain definition of sect. 127.

The argument for the defendant is that the person creating the estate or from whom it is devised must die after the passing of the act to confer the succession defined. Such is not the language of the section.

It suffices if by the death of any person after the passing of the act the devisees become beneficially entitled in possession to the estate. By the death of the mother the children who theretofore had an estate in expectancy became beneficially entitled in possession.

72 It seems equally clear that if the testator had died after the act, the mother and children living, a tax as upon an estate in expectancy would have accrued against the children.

In such case, under section 129, the tax would have been apportioned between the mother and children, and if she had subsequently died, the act being still in force, a new succession tax upon the value of her interest would have been payable by the children. The act is carefully framed, and the most comprehensive terms are employed to meet every case where a beneficial interest, either expectant or in possession, devolves upon a devisee.

The language is so clear and the conditions which constitute the definition of a "succession" and a successor are so plain and exact that

argument drawn from the sections of the act is unavailing. The duty of one dollar per centum was due to the United States.

The assessor properly added a penalty of fifty per centum as a penalty for refusal to make return. Such penalty is imposed by the
73 amendment to section 115 by the act of March 21, 1867.

When the person who should make return "wilfully neglects, or where such person refuses" to return, a neglect to make return is not necessarily wilful; a refusal is, or at any rate is by the statute made equivalent to a wilful neglect.

These conclusions are decisive against the plaintiff, and it is unnecessary to discuss the questions presented by the plea of the statute of limitations.

Judgement is ordered for the defendant.

Filed June 20th, 1876.

UNITED STATES OF AMERICA,

Circuit Court Clerk's Office, Northern District of New York, ss:

I, Charles Mason, clerk of the said court, do hereby certify that I have compared the foregoing copy of opinion of Wallace, J., with the original now on file in this office, and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have caused the seal of the said court to be affixed at the city of Utica in said district, this 21st day of August, A. D. 1876.

[L. S.] CHARLES MASON, *Clerk.*

74 (Indorsed:) United States circuit court northern district of New York. B. Huntington Wright, plaintiff, ag't Levi Blakeslee, defendant. Bill of exceptions. Filed Dec. 18, 1876.

7576 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the northern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between B. Huntington Wright, plaintiff, and Levi Blakeslee, defendant, a manifest error hath happened, to the great damage of the said B. Huntington Wright, plaintiff, as by his complaint appears. We being
77 willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, 1877, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said

Supreme Court, the 22d day of November, in the year of our Lord one thousand eight hundred and seventy-six.

[SEAL.] CHARLES MASON,
Clerk of the Circuit Court of the United States for the Northern District of New York.

Allowed by—

ALEX S. JOHNSON,
U. S. Cir. J.

78 (Indorsed:) Filed Dec. 18, 1876.

79 Know all men by these presents that we are held and firmly bound unto Levi Blakeslee in the full and just sum of five hundred dollars, to be paid to the said Levi Blakeslee or to his certain attorney, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents, sealed with our seals, and dated this 30th day of October, in the year of our Lord one thousand eight hundred and seventy-six.

Whereas lately at a circuit court of the United States, held in and for the northern district of New York, in a suit depending in said court, between B. Huntington Wright, complainant, and Levi Blakeslee, defendant, judgment was rendered against the said B. Huntington Wright for one hundred thirty-five dollars and thirty cents, the costs and disbursements of said action, on the 17 of Sep. 1876, and the said B. Huntington Wright having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Levi Blakeslee, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October, 1877:

Now, the condition of the above obligation is such, that if the said B. Huntington Wright shall prosecute the appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

B. HUNTINGTON WRIGHT. [L. S.]
STEPHEN VAN DUSAN. [L. S.]
WILLIAM E. SCRIPTURE. [L. S.]

Sealed and delivered in presence of—

Approved by—

80 ONEIDA COUNTY, *ss:*

On this 30th day of Oct., 1876, before me came Benjamin H. Wright, Stephen Van Dusan, and William E. Scriptur , to me known to be the same persons described in and who executed the within undertaking and each duly acknowledged the execution of the same.

[L. S.] C. S. GRIFFIN,
Notary Public.

ONEIDA COUNTY, *ss:*

Stephen Van Dusan and William E. Scripture, being each duly sworn, says he is worth the sum of five hundred dollars over and above all of his debts, and exclusive of property exempt from levy and sale on execution, and that we are residents and freeholders within the northern district of N. Y.

STEPHEN VAN DUSAN,
WILLIAM E. SCRIPTURE.

Sworn to before me this 30th day of October, 1876.
[L. S.] C. S. GRIFFIN,
Notary Public.

(Indorsed:) Circuit court of the U. S., northern dist. of N. Y. B Huntington Wright ag't Levi Blakeslee. (Copy.) Bond on writ of error by plaintiff to the Supreme Court of U. S.

I approve the within bond as to form and execution, and the sufficiency of the sureties.
Nov. 23, 1876.

ALEX. S. JOHNSON,
U. S. Cir. J.

The within bond is hereby approved, both as to form and sufficiency, by me on signing the citation to appear in the Supreme Court of U. S. on writ of error.

And I hereby direct and permit this security to be a supersedeas to any execution being issued upon the judgement rendered in the within action, upon its being filed with the clerk of the circuit court of U. S. north. dist. of N. Y.
Filed Dec. 18, 1876.

81 UNITED STATES OF AMERICA, *ss:*

To Levi Blakeslee, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington, D. C., on the second Monday of October, A. D. 1877, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of New York, wherein B. Huntington Wright is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Wait, Chief Justice of the Supreme Court of the United States, this 23rd day of November, in the year of our Lord one thousand eight hundred and seventy-six.

ALEX'R S. JOHNSON,
U. S. Cir. J.

82 UNITED STATES OF AMERICA,
Northern District of New York, Oneida County, ss:

Edwin H. Risley being duly sworn by me doth depose and say that he resides in the city of Utica, in said State, district, and county; that he is of the age of twenty-one years and upwards; the he knows and is well acquainted with Levi Blakeslee, the defendant named in the within citation, and has been for a number of years; that on the 7th day of February in the year 1877, at the city of New York, and in the post-office building of the United States, in said city, he duly and personally served on said Levi Blakeslee the within citation, by deliv'g to and leaving with said Levi Blakeslee a true copy thereof, and at the same time showing to him the within signature of Judge Johnson; that he knew the person sued to be Levi Blakeslee, the within defendant.

EDWIN H. RISLEY.

Subscribed and sworn to before me this 27th day of February, 1877.
M. L. BONNEY,
Commissioner U. S. Circuit Court, North. Dist. of New York.

(Indorsed:) United States circuit court, northern dist. of N. Y. B. Huntington Wright, pl'ff in error, ag't Levi Blakeslee, def't in error. Citation to appear in the Supreme Court of the United States on writ of error, &c. Original. Filed Feb. 27, 1877.

83 UNITED STATES OF AMERICA,
Northern District of New York, ss:

I, Charles Mason, clerk of the circuit court of the United States of America for the northern district of New York, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom, now on file and remaining of record in my office, being a full and complete copy of the record and proceedings in the suit of B. Huntington Wright vs. Levi Blakeslee.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court at the city of Utica this 14th day of May, A. D. 1877.

[SEAL.] CHARLES MASON, *Clerk.*

84 Supreme Court of the United States, of the October term, in the year of our Lord one thousand eight hundred and seventy-seven,

B. HUNTINGTON WRIGHT, PLAINTIFF IN ERROR,
ag't
LEVI BLAKESLEE, DEFENDANT IN ERROR.

Afterwards, to wit, on the second Monday of October in the same term, before the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, D. C., comes the said B. Huntington Wright, plaintiff in error, by Addison C. Miller, his attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid given was given for the said Levi Blakeslee, defendant in error, against the said B. Huntington Wright, plaintiff in error, whereas by the law of the land the said judgment ought to have been given for the said B. Huntington Wright against the said Levi Blakeslee, and the said B. Huntington Wright prays that the judgment aforesaid may be reversed, annul'ed, and altogether held for nothing, and
85 that he may be restored to all things which he has lost by occasion of the said judgment.

ADDISON C. MILLER,
Attorney for Plaintiff in Error, Utica, Oneida Co., N. Y.

(Indorsed:) Supreme Court of the United States. B. Huntington Wright, pl'ff in error, ag't Levi Blakeslee, def't in error. Addison C. Miller, att'y for plaintiff in error, Utica, N. Y.

(Indorsed:) Supreme Court of the United States. B. Huntington Wright, plaintiff in error, vs. Levi Blakeslee, defendant in error. Writ of error & return.

(Indorsement on cover:) No. 238. B. Huntington Wright, plaintiff in error, vs. Levi Blakeslee (late collector of internal revenue). N. New York C. C. U. S. Filed 6th October, 1877.

White & Floyd, Printers, corner of John and Broad Streets, Utica, N. Y.

OFFICE SUPREME
FILE
APR 5
D. W. MIDDLETO

SUPREME COURT OF THE UNITED STATES.

IN THE SUPREME COURT OF THE UNITED STATES

B. HUNTINGTON WRIGHT, *Plaintiff in Error,*
agst.
LEVI BLAKESLEE, *Defendant in Error.*
} *No. 238.*

BRIEF FOR PLAINTIFF IN ERROR.

PRELIMINARY STATEMENT.

The writ of error is brought by the plaintiff in error to review a judgment at law, entered against him and in favor of the defendant in error by the Circuit Court of the United States for the Northern District of New York, on the 19th day of September, 1876. (p. 10.)

The action was commenced by the plaintiff in error, in the County Court of the county of Oneida, and State of New York, (p. 4,) and removed into the Circuit Court on the petition of the defendant, showing that the action was commenced against him for acts done as Collector of Internal Revenue for the 21st District of the State of New York. (p. 1, 2, 3.)

The plaintiff in error sought to recover in the action of the defendant in error the sum of $585.59 and interest from July 20, 1867, being the amount of a succession tax paid to the defendant as such Collector of Internal Revenue at time last aforesaid, on the estate of Henrietta Wright by the plaintiff and his sister Henrietta H. Wright, and who had assigned her interest therein to the plaintiff in error, and charged in

his complaint as having been illegally and improperly assessed by the Assessor of the said District, and having been paid by compulsion of said Assessor to the defendant in error. (p. 4, 5.)

The defendant justified the levy and collection of the said succession tax as in all respects legal, including the penalties added thereto. (p. 5, 6.)

The plaintiff in error replied demanding judgment as in his complaint. (p. 6.)

The issue of fact was tried by the Court—(a jury having been waived by the stipulation of the parties) (p. 7,) on the 22d day of January, 1876, at Albany, and afterwards the Court made its findings of fact and law in writing, and decided and found that the tax and penalty were properly assessed and collected, and that the plaintiff in error could not maintain the action, (p. 8, 9,) and filed an opinion upon the law as decided on the trial and decision, (p. 21, 22, 23.)

Plaintiff in error filed exceptions to findings of law, (p. 10,) made a bill of exceptions, (from p. 11 to p. 21,) assigned errors, (p. 26,) and brought writ of error to this Court, (p. 23,) also summons to the defendant to appear in this Court and show cause, &c., (p. 25.)

FACTS.

On the 7th day of May, 1842, Henry Huntington, a resident of Oneida County, N. Y., made his will, which was executed in due form and in conformity to the laws of New York. (Page 11, folio 42.)

On the 11th day of October, 1846, the testator, Henry Huntington, died. (Page 12, folio 44.)

On the 29th of October, 1846, the will was in due form of law, admitted to probate as a will of personal and real estate. By the will, Benjamin N. Huntington, Edward Huntington and Hiram Denio were made executors. (Page 12, folio 44.)

The *third* bequest in the will directed that all of the rest, residue and remainder of his personal and real estate, of every

kind and description, "be divided into five equal parts or shares." (Page 11, folio 43.)

The *seventh* bequest disposed of one of said five shares as follows: "In case, therefore, my said daughter Henrietta "shall at the time of my decease, be *femme covert*, I give and "devise unto my executors, hereinafter named, one other of "the said equal parts or shares of the residue of my estate, in "trust, to receive the rents and profits of such parts thereof, "as shall be in real estate," &c. "And to apply the said rents, "income," &c., "to the sole and separate use of my daughter "Henrietta, during the term of her natural life." "And at "the decease of my said daughter, Henrietta, if she shall leave "issue, her surviving and living at the time of her death, I do "give, devise and bequeath the said part or share to such "issue, to hold to them, their heirs and assigns, and legal rep-"resentatives, in full and absolute possession; the issue, if "more than one, taking in such shares and proportions as they "would have taken under the laws of descents and distribu-"tion, providing Henrietta had been seized of the inheri-"tance."

In case she died without issue, then the will directed it to be divided between other parties. (P. 11, 12, fols. 43, 44.)

At the time of Henry Huntington's death, Henrietta D. Wright, the devisee named in the seventh clause of the will, was a *femme covert* and had a son, the plaintiff, and a daughter. Henrietta D. Wright died in September, 1865, leaving her two children her surviving. Benjamin H. Wright, husband of the devisee and father of the two children, from the death of his wife, had sole charge of the estate, and especially the subject of the succession tax. (P. 12, fols. 44–5.)

The Assessor of Internal Revenue of the Twenty-first District, notified the son and daughter that they were required to make a return to the Assessor as required by the 147th section of the act of 1864. (P. 12, fol. 45.)

Mr. Wright, the father, appeared before the Assessor, and claimed that the estate was not liable to assessment for a succession tax. (P. 12, fol. 45.)

The Assessor overruled the objection and proceeded and

assessed a tax of one per cent. upon the full value of the real estate mentioned in the *seventh* clause of the will. (P. 15, 16, 17, 18, 19, 20.)

In June, 1867, the assessor notified the parties of the tax unpaid, the value of the property and the penalty affixed. (See his letter or notice in evidence. P. 12, fol. 46.)

It will be seen that by reference to the assessment, there was no *proof* before the Assessor and no *finding* by him that they had "*willfully*" refused to make return. Nor is any such claim made in the notice of the assessment. (P. 12, fol. 46; p. 18, fol. 60.)

The assessment, or tax, was placed upon the assessment roll and apportioned to each of the parties. (P. 18, fol. 61.)

On the 20th of July, 1867, the Collector, to whom the tax assessed, including the penalty, had been forwarded for collection, notified the parties that they must pay the tax in ten days or an additional penalty would be imposed. (P. 13, fol. 46.)

On the 31st of July, 1867, the parties paid the tax *under protest*, the tax paid amounting to $595 59. (P. 13, fol. 46, 47.)

On the 5th of October, 1872, the Commissioner of Internal Revenue wrote the parties that the claim to have the tax refunded, had not been submitted to the Department, and forwarded them a blank to be filled up and transmitted to the Department, and they would then pass upon the case upon its merits. (See Exhibit G, Letter of October 5, 1872. P. 13, fol. 48.)

About the 1st of January, 1873, the appeal was perfected, and filed with the Commissioner. (P. 13, fol. 48.)

On the 3d of July, 1873, the Commissioner rendered his decision upon the merits, rejecting the whole claim, and gave notice thereof. (See Exhibit I, Letter of July 3, 1873. (P. 14, fol. 49.)

On the 15th of June, 1875, Henrietta D. Wright, one of the parties against whom one-half of the tax had been levied and collected, transferred her claim to the plaintiff. (P. 14, fol. 50.)

On the same day, a summons was delivered to the Sheriff of New York to serve on defendant. (P. 14, fol. 50.)

On the 24th of June, 1875, the summons was actually served on defendant. (P. 14, fol. 50.)

That at the time of the payment of the said tax and penalties, the defendant was Collector of Internal Revenue of the Twenty-first District, N. Y., and they were paid to him; and that he paid them over to the proper officers of the United States. (P. 15, fol. 51.)

The plaintiff in error insists that the judgment of the Court below was erroneous:

First. That the estate was not taxable under the Internal Revenue law.

Second. That the statute is prospective and not retrospective; and the ancestor having died before the passage of the statute, the estate is not taxable.

Third. That the estate being created before the passage of the statute, it is not subject to its provisions.

Fourth. That if the statute does apply to this estate it is unconstitutional.

Fifth. That the penalties for nonpayment of the succession tax was illegally and unjustly levied and assessed.

Sixth. There had been no willful refusal or neglect in the payment of the tax, such as warranted the Assessor in imposing the penalties.

I.

The assessment was claimed to have been made under sections 126, 127 and 128 of an act of Congress entitled, "An Act to provide internal revenue," &c., approved June 30, 1864.

Section 126 of said act declares, "That for the purposes of the act the term succession shall denote the *devolution of title to any real estate.*"

This denotes the absolute record title passing from one to another which confers upon the successor the unqualified right of disposition or alienation, and is the governing clause.

Section 127 declares "that any past or future *disposition* of real estate by will, deed or laws of descent, by *reason whereof* any person *shall become* beneficially entitled in POSSESSION or EXPECTANCY upon the death of any person dying AFTER the PASSAGE of this act, shall be deemed to confer on the person entitled by *reason* of *any* such *death* a *succession*, and the term *successor* shall denote the person so entitled, and the term *predecessor* shall denote the *grantor, testator, ancestor* or *person* from whom the *interest* of the successor has been or shall be derived."

This section makes two classes of estates taxable:

First, estates "IN POSSESSION."

Second, estates "IN EXPECTANCY."

These two classes of real estates to be taxable must be created by "*will, deed* or *law of descent.*" The *person* creating the estate, or from whom it is derived, designated "*predecessor*," must die "*after the passage of* this act."

Every past or *future* disposition of real estate, by *will, deed* or *laws of descent*, by which an estate "*in possession or expectancy*," shall be created by the death of the predecessor, dying after the passage of this act, was declared subject to the tax, imposed by the act.

The "*past*" disposition here mentioned referred to cases where a "*will* or *deed*" had been executed prior to the passage of the law, but had not taken effect in respect to the heirs or grantees, because the testator or grantor was then living. There was no impropriety in embracing this class, for the reason that it could not be regarded in the light of a retroactive effect, or an interference with vested rights, even though the testator or grantor should have executed his will or deed in conformity with existing laws at the time it was made; he had, moreover, the right to alter it to conform to any change in the law and remove any inequality created by change in the law.

This construction clearly harmonizes with the plain language of the act. The estates "in *possession*" or "*expectancy*" that were taxable, were those to which the successor became entitled, "upon the death of any *person dying after the passage of this act.*"

The "PERSON" here referred to, is the person who created the estate by "*deed* or *will*," termed in the act "predecessor."

And that "*person*" must die "*after the passage of this act.*" This excludes title held in trust created before the passage of the act. In order to assess this estate the assessor was compelled to construe the "*person*" referred to in the act as meaning the "*person*" upon whose death the estate "*in expectancy*" was converted into an estate "*in possession.*" This was clearly erroneous.

The construction contended for by the defendant would make every "*past*" disposition of real estate by will or deed, or laws of descent, subject to tax, no matter how remote the disposition of the same. If the "*past*" disposition referred to in the act related to estates which had been created before the passage of the act, it would be clearly unconstitutional, as it would subject nearly all the land in the United States to a direct tax.

Estates "in possession" as well as estates "in expectancy" are each taxable equally. But the payment of the tax upon the estate "in expectancy" is postponed until the estate becomes one "in possession," accruing by the death of the person creating the same, "after the passage of this act."

The authority to assess in any case commences on the death of the owner in fee of any real estate, dying "*after the passage of this act*," and the latter if then assessable, and *then only*, either as an estate "*in possession*" or an estate in "*expectancy*," just as the parties are indicated. This settles any question that might have arisen as to the exemption of a will executed with all formality before the passage of the law, but had not then taken effect.

The disposition of the real estate in this case, was made previous; it took effect in 1846, long before the passage of the act which in respect to any successor was declared to be future, "shall be."

The injustice of any other construction is made prominent by the arbitrary tax imposed upon plaintiff and his sister, when the other heirs paid no tax at all.

Both the grammatical construction and justice harmonize completely and exclude this case from any intervention of the assessor.

Section 128 is another section governing the assessment, and is supplement to section 127. It refers to that portion of an estate which is that of an estate in "*expectancy*" separating the latter from an estate "*in possession.*" A life interest is here referred to.

To illustrate a case where this section would apply: supposing a person had made his will and died after the passage of this act, devising an equal, undivided one-half of his real estate to one person, and the other equal, undivided one-half was devised to the same, or another legatee, subject *to a life lease or life annuity*, or any other charge that was *ascertainable* only *by reference to death.* In such a case the whole estate would be assessable, on the death of the person who made the will—the predecessor. The interest to which the devisee succeeded on the termination of the life estate, is by this section denominated "*the increase of benefit.*"

In the case suggested it would be a hardship for a legatee whose estate rested in "*expectancy,*" to pay the tax until he came into possession, consequently the tax as to that portion, although assessable upon the *creation* of the *estate*, by the death of the person who created it and who must die "after the passage of this act," was postponed until the successor came into possession by the determination of the charge or life estate, and its value was to be added to the estate already "*in possession,*" and its increased value thus acquired was liable to pay the tax before assessed.

But for this section, estates "*in possession*" and estates in "*expectancy*" would be liable to pay the same tax at the same time, and thus the person entitled to the estate in "*expectancy*" would be compelled to pay a tax on an estate to which he might never become entitled.

Section 135 refers to the payment of duties, and serves to

remove all obscurities in regard to the correct intepretation of section 128. It regards the assessment or tax imposed by section 128 as a lien upon the estate in "*expectancy.*" It permits a change of ownership, but subject to the imposed tax payable on the determination of the life estate or charge; "and where the title to any succession shall be accelerated by the surrender or extinction of any prior interest, then the duty thereon shall be payable at the time of such surrender or extinction of such prior title."

Section 137 also serves to remove any obscurity in sections 127 and 128. It prescribes that the duty imposed by the act shall be paid at the time when the "*successor,*" or any person in his right "*shall become entitled in possession* to his succession, or to the receipts of the income and profits thereof." In case the "successor" was not entitled to the full enjoyment of the estate by reason of any charge *not* created by the "*successor,*" on the termination of such charge, then the tax imposed became payable, unless previously compounded or settled for.

These sections serve to show conclusively that the two classes of estate which were declared taxable by the 127th section, were estates which were created by the death of a *person*, dying after the passage of this act, and the "*person*" there referred to is the person who created the estate either in "possession or expectancy," and the "*past disposition*" there referred to relates to deeds or wills executed before the passage of the act, but which had not taken effect as before stated. The authority to assess either an estate "in possession or expectancy" is given by section 127. The other sections refer solely to the period when the tax is payable.

In the case at bar, the Assessor, instead of assessing the estate in "*expectancy*" when created, assessed the period when the tax, if assessable at all, was payable. If the estate was taxable at all, it was only on the net rental to which the plaintiff and his sister succeeded on the death of their mother. The rights to which they succeeded under the will were the rents and profits.

In *Brune v. Smith*, decided by Bond and Giles, JJ., in the Maryland Circuit, the Court fell into the error of holding

that a disposition of real estate in 1803, whereby an estate for life had been created, was a "past" disposition contemplated by the act. That case was beyond all question erroneously decided.

II.

Section 147 requires the person or persons liable to pay a succession tax to give notice thereof, and deliver an account of the same to the Assessor.

Section 148 provides that a "*willful neglect*" to give notice or deliver an account as required, will render the person liable to pay a "sum equal to ten per centum upon the amount of tax payable."

The parties in this case did not "*willfully*" neglect to give notice and account to the assessor; when notified by the assessor to make returns, they appeared before him and claimed that the estate was not liable to an assessment. They made that objection for the purpose of protecting their legal rights. This cannot be construed as a *willful* neglect to make return.

The assessor in his assessment does not find that they "*willfully*" neglected to make return. He distinctly finds that they only *neglected*. No *willful* negligence can be implied. (See the assessment and notice.)

The whole penalty of 50 per cent. was illegally imposed by the assessor.

III.

The assessment being void in part, was void as to the whole.

Rose v. Truax, 21 Barb. 361, 376.
4 Wash. C. C. R. 297.
11 Wheaton 258.
4 Coms. 449, 459.

The Court cannot proceed and reassess the proper tax in case any is assessable; the whole tax must be refunded and a reassessment made by the assessor.

IV.

No right of action on this claim had accrued under the old law, because no appeal had been taken from the assessment to the Commissioner as required by the act of July 15th, 1866, section 19.

The appeal in this case was taken on the 3d of January, 1873, and decided by the Commissioner July 3d, 1873. The statute of limitation was therefore two years from July 3d, 1873, and is governed by the Revised Statutes 622, 623, § § 3226, 3227. The summons in this action was actually served June 24th, 1875, on the defendant, within the two years from the time the cause of action accrued. This claim does not come within the proviso of section 3227 of the Revised Statutes, as it was not pending in the Department on the 6th of June, 1872.

V.

The defendant plead the wrong statute of limitation. The true limitation was two years from the time the cause of action accrued, which, upon the proof, was July 3d, 1873.

The time when the cause of action accrued, under either the old law or under the Revised Statutes, was July 3d, 1873. This period when the right of action accrued was not plead by the defendant. *The time when the statute begins to run must be specially averred,* and this is especially so in cases where the time when the statute begins to run depends upon the happening of an event.

Malroy v. Lamphere, 8 How. 491.

LASTLY.

The plaintiff is entitled to judgment for $595.59, with interest thereon from the 31st of July, 1867, besides costs.

A. C. MILLER,
Solicitor for Plaintiff, Utica, N. Y.

FILED
APR 2 1880
D. W. MIDDLETON, Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1879.

No. 238.

B. H. WRIGHT, PLAINTIFF IN ERROR,

vs.

LEVI BLAKESLEE, COLLECTOR, &c.

BRIEF FOR THE DEFENDANT IN ERROR.

Suit to recover $595.59, which Blakeslee, as collector, had exacted (July 31, 1867) for a *succession tax*, upon certain real estate in the city of Utica, New York, which, in September, 1865, came into the possession of the plaintiff and his sister, under the will of their grandfather, who had died in October, 1846.

The devise had been, originally, of a *remainder* after a life estate to their mother, who died in September, 1865.

The question is, whether the act of 1864, c. 173, (June 30,) imposed a tax under the circumstances above stated.

The provisions of that act applicable to the case were as follows:

Section 126 (13 Stat., 287,) provided "that the term 'suc-

cession' shall denote the derivation of title to any real estate."

Section 127: "That every past or future disposition of real estate by will, deed or laws of descent, by reason whereof any person shall become beneficially entitled, in possession or expectancy, to any real estate or the income thereof, upon the death of any person dying after the passing of this act, shall be deemed to confer on the person entitled by reason of any such disposition a 'succession,' and the term 'successor' shall denote the person so entitled, and the term 'predecessor' shall denote the grantor, testator, ancestor, or other person from whom the interest of the successor has been or shall be derived."

Section 128: "That where any real estate shall, at or after the passing of this act, be subject to any charge, estate, or interest, determinable by the death of any person, or at any period ascertainable only by reference to death, the increase of benefit accruing to any person upon the extinction or determination of such charge, estate or interest, shall be deemed to be a succession accruing to the person then entitled beneficially to the real estate or income thereof."

Section 132. "That there shall be levied and paid to the United States in respect of every such succession as aforesaid, according to the value thereof, the following duties, that is to say—

"When the successor shall be the lineal issue or lineal ancestor of the predecessor, a duty at the rate of one dollar per centum upon such value."

* * * * * *

A special finding of facts is presented upon pages 8 and 9.

1. The view taken of the case by the learned judge below is stated clearly and concisely upon page 22 of the record.

That view is, in brief, that the statute applies to *successions in possession* as well as to *successions in remainder*, and that the succession here, *so far as it was in possession*, did not take place until after the statute in question had gone into effect.

2. The judgment may be sustained upon another view:

The succession at the death of the mother seems, at all events, clearly within section 128 quoted above. The *protest*, therefore, upon which this action is based (which appears ~~by the special verdict~~ to apply to only one-half of the tax: folio 47) being to the effect that *no tax* was due on account of such ~~dividention~~, was invalid, and does not warrant the action.

The principle in Davies *vs.* Arthur, 96 U. S., 143, appears to be in point. It will be seen that the contention of the plaintiff at the trial was in conformity to the theory of his protest: see *exception* upon folio 66 of the record.

The statute of 1864 requires persons *to take the initiative* in rendering accounts of successions in which they are interested, (section 147.) It is against the policy of the law that such persons, after *willfully* neglecting or *refusing* to render an account because of a special theory of their *exemption;* and protesting, and conducting their suit upon such theory, to avail themselves of some other theory involving partial liability, for the purpose of justifying a suit to recover a part of what had been exacted. Parties charged with tax must show themselves *innocent* if they would make avail of the extraordinary statutory remedy afforded in cases like the present.

3. It appears upon the face of the special verdict below (pp. 8 and 9) that the suit was barred by the statute of limitations. The facts upon this point are, that the tax was exacted July 31, 1867, (folio 34,) that the appeal to the